IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,	Case No. 2014-0120
Plaintiffs-Appellees,	On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District
-vs-	
BRANDON MOORE,	
Defendant-Appellant.	Court of Appeals Case No. 08MA20

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEY ASSOCIATION IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

In *Graham v. Florida*, 560 U.S. 48 (2010), the United States Supreme Court held that the Eighth Amendment prohibits a trial court from sentencing a juvenile offender to life without parole for a single nonhomicide offense. Defendant Brandon Moore was not sentenced to life without parole for any nonhomicide offense. Instead, he was convicted of numerous offenses, and for each offense the trial court imposed a prison term of a specific length within the applicable statutory range and ordered that they be served consecutively, for a total of 112 years.

Yes, Moore's cumulative prison sentence is lengthy. And yes, he may die in prison (or maybe not—he will be eligible for judicial release when he is 92 years old, Appellee's Brief, 23, n. 2). But that is only because the sheer number of Moore's crimes justifies this punishment. It is hardly "cruel and unusual" to require an offender to serve a separate sentence for each crime he or she commits. Even with juveniles, the commission of more crimes justifies more punishment.

Moore and his amici, however, argue that his cumulative sentence is unconstitutional under *Graham* because it is the "functional equivalent" to a life sentence. But comparing a life-without-parole sentence for a single offense to a cumulative sentence for multiple offenses is not an apples-to-apples comparison. It is more like comparing a single apple to a bushel of them, and the Eighth Amendment does not allow such apple-to-apples comparisons. As this Court held in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, the focus under the Eighth Amendment is on the individual sentence for each offense, not the cumulative sentence for multiple offenses. Consistent with this offense-specific approach, *Graham* established a categorical rule that banned a specific type of sentence: Life without parole for a *single* nonhomicide offense. The distinction between life without parole for a single nonhomicide offense and a lengthy cumulative sentence for several nonhomicide offenses is about much more

than the label given to the sentence—it is about recognizing the difference between the sentence imposed for a single offense and the cumulative sentence imposed for multiple offenses.

Extending *Graham* to cumulative sentences for multiple offenses would not only run afoul of basic Eighth Amendment doctrine as expressed in *Hairston*, but it would also create an unworkable rule. Trial courts would have to become quasi-actuaries. Plus, neither Moore nor his amici offer any standards as to where the line would be separating a constitutional cumulative sentence from an unconstitutional one. And because life expectancy depends on any number of factors, what counts as a permissible cumulative sentence will depend on the specific facts of each case, thus defeating the whole point of *Graham*'s categorical rule. But perhaps most importantly, a cumulative-sentence approach would turn proportionality review upside down, because in certain cases the *more* crimes an offender commits, the *less* he or she can be punished on each offense.

The Court in *Graham* and other cases has exhaustively documented the differences between juvenile and adults. It is because of these differences that juveniles benefit from several categorical prohibitions on specific types of sentences. But proportionality under the Eighth Amendment cuts both ways: While the Eighth Amendment prohibits imposing a disproportionate sentence for any offense, it does not prohibit imposing a proportionate sentence for every offense.

Finally, there are jurisdictional and error-preservation issues lurking in this case that may justify dismissing it as improvidently granted. But if this Court does choose to address the merits of Moore's Eighth Amendment claim, the Seventh District should be affirmed.

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorney Association (OPAA) is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice. As part of their duties, OPAA members prosecute juveniles for criminal offenses. Thus, OPAA members have a strong interest in ensuring that courts do not improperly interpret the Eighth Amendment, so as to limit a trial court's ability—in appropriate cases—to sentence juveniles to lengthy cumulative sentences for multiple offenses. In the interest of aiding this Court's review of this appeal, OPAA offers the following memorandum in support of Plaintiff-Appellee State of Ohio.

STATEMENT OF THE CASE AND FACTS

OPAA adopts the statement of the case and facts contained in the State of Ohio's brief.

ARGUMENT

> **Proposition of Law**: The Eighth Amendment does not prohibit trial courts from sentencing juveniles to lengthy cumulative sentences for multiple nonhomicide offenses, even when the cumulative sentence may exceed the juvenile's life expectancy.

This case is a poor vehicle to address Moore's proposition of law, because Moore raised no Eighth Amendment claim at the time of sentencing, and because the Seventh District lacked jurisdiction to reconsider its 2009 final judgment. But if this Court does choose to address the merits of Moore's argument, the Seventh District should be affirmed.

I. Jurisdictional and Error-Preservation Issues Make This Case a Poor Vehicle to Address the Question Presented.

This case is a poor vehicle to address the Moore's Eighth Amendment claim. After two remands, the Seventh District affirmed Moore's sentence in 2009. *State v. Moore*, 7th Dist. No.

08 MA 20, 2009-Ohio-1505. Moore did not appeal this judgment to this Court. In 2010, Moore obtained a writ of mandamus compelling the trial court to issue a new sentencing entry. *State ex rel. Moore v. Krichbaum*, 7th Dist. No. 09 MA 201, 2010-Ohio-1541. Moore tried to appeal from the new sentencing entry, mostly claiming that his sentence was unconstitutional under *Graham*. The Seventh District, however, held that the new entry was not a final appealable order. *State v. Moore*, 7th Dist. No. 10-MA-85, 2011-Ohio-6620, ¶¶ 21-31. The Court further held that Moore's *Graham* argument was barred by res judicata and "is more properly raised in a petition for postconviction relief." *Id.* at ¶ 33.

But Moore did not raise his Eighth Amendment claim in a postconviction petition, as suggested by the Seventh District. Instead, he filed an untimely application for reconsideration under App.R. 26(A). The Seventh District, however, lacked jurisdiction to reconsider its 2009 judgment. "Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article." Ohio Constitution, Section 3(B)(3), Article IV. Section 2(B)(2) in turn defines this Court's appellate jurisdiction. Thus, an appellate court loses jurisdiction once the time to appeal to this Court has expired:

> Section 3(B)(3) * * * provides that appellate judgments are final unless appealed as of right or by a request for this court's discretionary review pursuant to Section 2(B)(2), Article IV, Ohio Constitution. The effect of this deadline is clear—if no such appeal is filed, the judgment is binding and no longer subject to the court of appeals' jurisdiction to reconsider.

State ex. rel. LTV Steel Co. v. Gwin, 64 Ohio St.3d 245, 249-250 (1992). There is "no precedent that establishes a court of appeals' jurisdiction to reconsider a judgment after the deadline in Section 3(B)(3) * * *." *Id.* at 250. Given that the deadline to appeal to this Court had expired, the Seventh District had no jurisdiction to reconsider its 2009 judgment. A court of appeals does not have perpetual jurisdiction to reconsider its judgments.

Even if the Seventh District did have jurisdiction, Moore's Eighth Amendment claim was not preserved for appeal, thus waiving all but plain error. Crim.R. 52(B). Moore cannot show plain error because it was far from "plain" at the time of sentencing that Moore's cumulative sentence violated the Eighth Amendment. *State v. Barnes*, 94 Ohio St.3d 21, 28 (2002) (error must be "'plain' at the time that the trial court committed it").

Moore bemoans the Seventh District's finding that his Eighth Amendment claim is barred by res judicata. Appellant's Brief, 4, n. 3. But while Moore believes that res judicata does not apply because *Graham* had not yet been decided in 2009, there is "no merit" to the claim that a new judicial decision is an exception to the res judicata bar. *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996). "'[P]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Id.*, quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). The defendant in *Graham* was able raise an Eighth Amendment claim in the trial court and in his direct appeal; there was no reason Moore could not do so also.

The res-judicata holding in *Szefcyk* is a variation of the general rule that a "new judicial ruling may be applied only to cases that are pending on the announcement date." *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6, citing *State v. Evans*, 32 Ohio St.2d 185, 186 (1972). "The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies." *Ali* at ¶ 6. Moore's sentence was no longer "pending" when *Graham* was decided. His sentence became final in 2009 when the Seventh District affirmed his sentence and he did not pursue any appeal in this Court. And

final means just that: *final*. A defendant cannot artificially "unfinalize" his sentence by filing an untimely application for reconsideration.

Moreover, the Seventh District was exactly right in suggesting that Moore file a postconviction petition. A postconviction petition is the "exclusive remedy" to collaterally challenge a conviction or sentence. R.C. 2953.21(J). A "collateral challenge" is any legal challenge that to the judgment outside the direct-appeal process. *Wall v. Kholi*, 131 S.Ct. 1278, 1283-1285 (2012) (defining "collateral review"); *Hollingsworth v. Timmerman-Cooper*, 133 Ohio St.3d 253, 2012-Ohio-3907, ¶ 15 (citing *Wall*). Again, the direct-appeal process ended in 2009, so Moore's untimely application for reconsideration was a collateral challenge to his already-final sentence. C.f., *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, syllabus (reopening proceedings under App.R. 26(B) are collateral postconviction proceedings and not part of the direct-appeal process).

Although postconviction petitions are subject to a strict time deadline, R.C. 2953.21(A)(2), the postconviction statute allows a defendant in narrow circumstances to file an untimely or successive petition challenging a conviction or sentence based on a new judicial decision. First, the defendant must show that "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right." R.C. 2953.23(A)(1)(a). Second, the defendant must show "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." R.C. 2953.23(A)(1)(b).

Lower courts have uniformly held that these requirements are jurisdictional. *State v. Payne*, 1st Dist. No. C-130790, 2014-Ohio-3113, ¶ 6; *State v. Hughes*, 10th Dist. No. 13AP-1006, 2014-Ohio-2914, ¶ 10; *State v. McCain*, 2nd Dist. No. 26020, 2014-Ohio-2819, ¶ 17. Indeed, the Seventh District in Moore's own case has recognized the jurisdictional nature of these requirements. *State v. Moore*, 990 N.E.2d 165, 2013-Ohio-1431, ¶ 20 (7th Dist.).

Moore cannot meet these jurisdictional requirements. True, some federal courts have held that *Graham* applies retroactively on collateral review. See, e.g., *In re Moss*, 703 F.3d 1301, 1302-1303 (11th Cir.2013); *In re Sparks*, 657 F.3d 258, 260-262 (5th Cir.2011). But even assuming that *Graham* does apply retroactively, Moore is not really pursuing a claim under *Graham*. Instead, he is seeking to *extend* the holding in *Graham* to a different factual scenario that was not present in *Graham* itself. In other words, the actual holding in *Graham* does not apply to "persons in [Moore's] situation." R.C. 2953.23(A)(1)(a). In any event, the only type of sentence that can be challenged in an untimely or successive postconviction petition is a "sentence of death." R.C. 2953.23(A)(1)(b); *State v. Hall*, 4th Dist. No. 06 CA 17, 2007-Ohio-947, ¶ 16 (even if retroactive right was at stake, jurisdiction was lacking because defendant was challenging non-death sentence).

The Seventh District below addressed the merits of Moore's Eighth Amendment claim, stating that Moore had "no other avenue to avail himself of the retroactive constitutional argument that his sentence violates [*Graham*]." Opinion, at ¶ 1; see, also, *id.* (DeGenaro, J., dissenting) ("no other avenue to make this argument"). But because postconviction petitions are the "exclusive remedy" to collaterally challenge a sentence, the fact that Moore is not entitled to relief under the postconviction statute means that he is not entitled to relief—*period.* An inability to obtain relief under the postconviction statute is not a reason for an appellate court to

ignore Crim.R. 52(B) and its own jurisdictional limits under Section 3(B)(3) by considering an untimely application for reconsideration. Nor does an inability to obtain relief through other means constitute "extraordinary circumstances" under App.R. 26(A) (especially considering that Moore's application was filed *three years* after *Graham* was decided).

In short, the Seventh District lacked jurisdiction to entertain Moore's unpreserved Eighth Amendment claim. Of course, subject-matter jurisdiction can be raised at any time. *Pratts v. Hurley*, 102 Ohio St.3d 31, 2004-Ohio-1980, ¶ 11. The constitutional issue presented in this case would be better addressed in an appeal that does not pose these jurisdictional and error-preservation roadblocks. Accordingly, this Court should consider dismissing this case as improvidently granted.

II. The Eighth Amendment Does Not Prohibit Sentencing Juveniles to Cumulative Sentences for Multiple Nonhomicide Offenses, Even When the Cumulative Sentence Exceeds the Juvenile's Life Expectancy.

Should this Court choose to address the merits of this appeal, the Seventh District correctly rejected Moore's Eighth Amendment claim. *Graham* established a categorical rule: Juvenile offenders may not be sentenced to life without parole for a single nonhomicide offense. That the category is defined in terms of a specific sentence for a single offense is consistent with the rule that proportionality review under the Eighth Amendment is offense-specific. Extending *Graham* to include cumulative sentences for multiple offenses would create an unworkable standard and would defeat the very purpose of having a categorical rule in the first place—i.e., to provide a "clear line" of permissible sentences.

A. *Graham* Established a Categorical Rule That Prohibits a Specific Type of Sentence: Life Without Parole for a Single Nonhomicide Offense.

There are two types of proportionality review under the Eighth Amendment. The first type involves a case-by-case analysis to determine whether a term-of-years sentence is grossly

disproportionate to the crime. *Graham* at 59-60. The second type involves considering either the nature of the offense or the characteristics of the offender to determine whether a particular category of punishment should be prohibited. *Id.* at 60.

The Court in *Graham* applied the categorical approach and held that the Eighth Amendment prohibits sentencing a juvenile to life without parole for a non-homicide offense. *Id.* at 82. Thus, *Graham* established a categorical rule, and it is categorical in two respects: (1) it applies to a category of offenders, i.e., juveniles; and (2) it applies to a category of sentences, i.e., life without parole for a single nonhomicide offense. The purpose of this categorical rule is to provide a "clear line" to "prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Id.* at 75.

The first category is easy to define. A juvenile is anyone under 18 years old. *Id.* at 74. Regarding the second category, *Graham* banned only the specific sentence of life without parole for a single nonhomicide offense. *Bunch v. Smith*, 685 F.3d 546, 550-552 (6th Cir.2012). Throughout the opinion, the Court repeatedly referred to the banned sentence as "life without parole." Moreover, the Court framed the issue in the case in singular-noun terms—i.e., "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide *crime.*" *Graham* at 52-53 (emphasis added). In explaining why it analyzed the case under the categorical approach (rather than the grossly-disproportionate approach), the Court again used singular nouns, stating that the case implicates a "particular type of *sentence*" and that comparing the "severity of the *penalty* and the gravity of the *crime* does not advance the analysis." *Id.* at 61 (emphasis added).

The Court's focus on the specific sentence of life without parole for a single nonhomicide offense runs throughout the opinion. In conducting its "national consensus" survey, the Court listed jurisdictions that permit life without parole for a single offense; it did not count states that permitted lengthy cumulative sentences for multiple offenses. *Id.* at 62 (citing Appendix). Along these same lines, the Court's examination into "actual sentencing practices" identified juvenile offenders serving life-without-parole sentences for single nonhomicide offenses, not those serving lengthy cumulative sentences for multiple offenses. *Id.* at 62-64. Distinguishing the case from scenarios in which a juvenile was sentenced for nonhomicide and homicides, the Court again used singular-noun phrasing: "The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide *offense*." *Id.* at 63 (emphasis added). In conducting its own "independent judgment," the Court reiterated that it was dealing with a specific sentence for a single offense, stating "[t]he age of the offender and the nature of the *crime* each bear on the analysis." *Id.* at 68 (emphasis added).

Finally, Justice Alito in dissent noted that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." *Id.* at 124 (Alito, J., dissenting). If Justice Alito was wrong in his description of the Court's holding, one would expect the majority to have said so in its opinion. It did not. A majority of the Court later picked up where *Graham* left off by describing the holding in *Graham* as banning a sentence of life without parole for a single offense. *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (emphasis) ("*Graham* concluded that the [Eighth] Amendment prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide *offense*.") (emphasis added).

The thing about categorical rules is that they deal in categories. Of course, categorical rules "tend to be imperfect," *Graham* at 75, but the need for a "clear line" outweighs any

imperfections. The first *Graham* category—age of the offender—is a perfect example. There is no principled reason that an offender who commits a crime the day before his 18th birthday should be treated differently under the Eighth Amendment than one who commits the same crime the day after his 18th birthday, everything else being equal. Some 18-year olds are more like children, and some 17-year olds are more like adults. But the constitutional line has been drawn at 18 years, and under the categorical approach courts may not shift the line in either direction based on the particular facts of the case.

So too with the second *Graham* category. The Court drew a line: Life without parole for a single nonhomicide offense. Just as *Graham* leaves no room for the State to argue that some juveniles are the "functional equivalent" to adults, *Graham* at 77-78, it likewise does not allow defendants to argue that some lengthy cumulative sentences for multiple nonhomicide offenses are the "functional equivalent" of a life-without-parole sentence for a single nonhomicide offense.

B. The Eighth Amendment Focuses on the Individual Sentence for Each Offense, Not on the Cumulative Sentence for Multiple Offenses.

Graham's focus on the specific sentence of life without parole for a single nonhomicide offense is consistent with the rule that the Eighth Amendment is offense-specific. This Court in *Hairston* held that "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Hairston* at syllabus; see, also, *State v. Wilkinson*, 17 Ohio St.2d 9 (1969), paragraph three of the syllabus ("It is not a cruel and unusual punishment for a defendant to be sentenced to consecutive terms for separate statutory crimes."). After reviewing state and federal caselaw, this Court concluded that "for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution,

proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *Hairston* at ¶ 20. "[I]t is not the aggregate term of incarceration but, rather, the individual sentences that are relevant for purposes of the Eight Amendment." *Id.* at ¶ 22; c.f., *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 9 ("[u]nder the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.").

While the defendant in *Hairston* was claiming that his cumulative sentence was grossly disproportionate to his crimes, this Court phrased its offense-specific holding to apply in *any* proportionality review. Indeed, the reasoning in *Hairston* applies with even greater force in the categorical type of proportionality review. In a categorical review, the need to specifically identify the forbidden sentence is paramount. The offense-specific approach ensures that trial courts know exactly where the "clear line" is that they cannot cross. But if the cumulative sentence is what mattered under the Eighth Amendment, it would be impossible to identify the forbidden category of sentence. Consider the present case: Life expectancies vary depending on the offender and other factors, and there are infinite variations of cumulative sentences for multiple offenses that could exceed a particular juvenile's life expectancy.

There is nothing disproportionate—either under the grossly-disproportionate review or the categorical review—for an offender's punishment to increase commensurate with the number of offenses he or she commits. A lengthy cumulative sentence for multiple offenses is not cruel and unusual punishment, but rather is "attributable to the *number* of offenses [] committed." *Hairston* at ¶ 16 (emphasis sic). In fact, while there now is a statutory presumption favoring concurrent prison terms, R.C. 2929.41(A), under common law it was *presumed* that sentences for multiple offenses would be served consecutively, *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-

1983, ¶ 13. Imposing concurrent sentences was seen as a "*reward* to the convict." *Id.*, quoting *Stewart v. Maxwell*, 174 Ohio St. 180, 181 (1963) (emphasis added). Thus, requiring an offender to serve a separate sentence for each crime is not disproportionately harsh, but rather not doing so is disproportionately lenient.

The offense-specific approach under the Eighth Amendment applies equally to juveniles. "Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." *Graham* at 71. Just as with an adult offender, society's interest in restoring the moral imbalance grows the more offenses a juvenile commits.

C. Prohibiting Cumulative Sentences that Exceed a Juvenile's Life Expectancy Would Create an Unworkable Rule.

Extending *Graham* to prohibit cumulative sentences that exceed a juvenile's life expectancy would not only contradict *Hairston*, it would create an unworkable rule. First and foremost, such a prohibition would deprive society of its ability to restore the moral imbalance, *Graham* at 71, and it would do so in cases in which the imbalance was at its greatest. Under such a rule, some juveniles will commit so many offenses that there will eventually be a point of diminishing returns where the sentence for each offense must be compressed to ensure that the cumulative sentence does not exceed his or her life expectancy. This would lead to the absurd result that a juvenile offender could obtain a *reduction* in punishment for some offenses by committing more offenses. And some offenders would commit so many offenses so as to escape any punishment at all for some offenses.

Normally, with each offense that an offender commits, society's interest in punishing the offender increases—both in terms of imposing a cumulative sentence, and in terms of imposing a more severe sentence for each offense. On this latter point, the Court in *Graham* recognized that

a life-without-parole sentence for a nonhomicide offense is constitutional if the juvenile offender also committed a homicide offense, for "[i]t is difficult to say that a defendant who receives a life sentence on a nonhomicid eoffense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination." *Graham* at 63. Prohibiting cumulative sentences that exceed a juvenile's life expectancy would deprive the trial court of its ability to impose a proportionate sentence for each offense.

Such a prohibition would pose administrative problems as well. Trial courts are ill-equipped to engage in the actuarial science of determining a juvenile's life expectancy. A particular juvenile's life expectancy will depend on a variety of factors—i.e., race, gender, medical history, socio-economic factors, etc. Because a juvenile's life expectancy will vary depending on the particular facts of the case, there could be equal protection problems in that similarly situated juveniles will receive different sentences for no other reason but that they have different life expectancies. Equally difficult is the task of determining at what point during the juvenile's lifetime must he or she have a "meaningful opportunity for release." *Graham* at 75. Is five years before life expectancy early enough? One year? Or does the timing of the opportunity for release depend on the particular facts of each case?

Complicating the issue further, a juvenile's life expectancy can change over time. If the juvenile is later diagnosed with a terminal disease, must the opportunity for release be moved up? Or, if the juvenile's life expectancy increases due to medical advances or some other development, must the juvenile then serve more of the cumulative sentence before getting an opportunity for release? If the meaningful opportunity for release is calculated in relation to a certain amount of time before life expectancy, then a trial court could impose a *longer* sentence

on a 16 year old than it could on a 17 year old with an equal life expectancy. In such a case, it will take longer for the 16 year old to reach the "maximum" cumulative sentence than the 17 year old.

The complications become even more troublesome when the cumulative sentence is imposed in multiple proceedings:

> What if the aggregate sentences are from different cases? From different circuits? From different jurisdictions? If from different jurisdictions, which jurisdiction must modify its sentence or sentences to avoid constitutional infirmity?

Walle v. State, 99 So.3d 967, 972 (Fla.Ct.App.2012).

The benefit of *Graham*'s categorical rule is that it provides a "clear line." *Graham* at 75. Courts know exactly what sentence they may not impose. But extending *Graham* to prohibit cumulative sentences for multiple nonhomicide offenses would be near impossible to apply. The prohibited sentence would be different in each case and would depend on factors that trial courts are ill-equipped to determine. All this, for a rule that is contrary to *Hairston*'s command that Eighth Amendment proportionality review be offense-specific.

CONCLUSION

For the foregoing reasons, OPAA respectfully requests that this Court either dismiss this appeal as improvidently granted or affirm the Seventh District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, September 2, 2014, to:

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